Section 106 Update
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This is the first of a series of Section 106 Updates, published periodically to assist Federal agencies in carrying out the requirements of Section 106 of the National Historic Preservation Act of 1966.

Section 106 Updates are prepared in 3-hole punched form, for easy filing and reference in a ring binder. For further information, write: Advisory Council on Historic Preservation, 1522 K Street, NW, Suite 430, Washington, D.C. 20005.

The Advisory Council on Historic Preservation serves as a primary policy advisor to the President and Congress on matters of historic preservation. An independent agency, the Council was established by the National Historic Preservation Act of 1966.

Responsibilities of the 19-member body include advising other Federal agencies to ensure that their actions are carried out with consideration to preserving the Nation's historic resources.

Supplementary Guidance:
Preparation of Memoranda of Agreement

On June 4, 1982, the Advisory Council on Historic Preservation (Council) temporarily suspended its regulations at 36 CFR 800.6(c)(1) which set out directions for preparation of Memoranda of Agreement. (See 47 FR 24306.)

The Council has prepared the following "Supplementary Guidance: Preparation of Memoranda of Agreement" for Federal agencies, State Historic Preservation Officers, and other interested parties to use in lieu of 36 CFR 800.6(c)(1).

The purpose of the suspension and these guidelines is to introduce more flexibility into the Memorandum of Agreement process while providing sufficient direction for the adequate preparation of Memoranda of Agreement. The suspension and guidelines do not relieve Federal agencies of any other responsibilities regarding Memoranda of Agreement that are contained in other provisions of 36 CFR Part 800.

The guidance which follows was published in the FEDERAL REGISTER on July 9, 1982, Vol. 47, No. 132, page 29861.

I. Purpose

This guidance is issued in accordance with 36 CFR §800.14 and provides Federal agencies, State Historic Preservation Officers, and other interested parties with information to assist in the preparation of Memoranda of Agreement (MOA) that are used to meet the requirements of Section 106 of the National Historic Preservation Act. This guidance is in lieu of the provisions of 36 CFR §800.6(c)(1), which have been suspended. Suspension of 36 CFR §800.6(c)(1) does not eliminate other provisions of 36 CFR Part 800 regarding Memoranda of Agreement.

II. Policy

A duly executed MOA constitutes the comments of the Council and evidences that a Federal agency has taken into account the effects of its undertaking on historic properties. It is a contractual document setting forth the rights and responsibilities of the signatories. As such, it must be precise in its terms and clearly understandable as to the intent of the parties should a question arise regarding compliance with the MOA. Within this framework, MOAs should be crafted to meet the particular needs of each undertaking and the consulting parties. In reviewing MOAs, the Executive Director will seek to ensure that they accurately and concisely set forth the agreements reached by the parties and that they are then executed with a minimum of paperwork and delay. Objections to a proposed MOA will be based on questions relating only to substantive matters, the clarity of the MOA, or legal sufficiency. Elements strictly of form will not be a basis for rejecting a proposed MOA.

III. Preparation of an MOA

Depending on the circumstances of the particular undertaking, an Agency Official may elect to follow either the normal process of preparing an MOA or an expedited method. An Agency Official is encouraged to assume responsibility for preparing an MOA and should select the method most appropriate to the particular undertaking and its effects. An applicant for Federal assistance or approval may draft the MOA.

A. Normal Process

When the consultation process (Section 800.6(b)) has been substantially concluded and the Agency Official, the SHPO, and the Executive Director have reached agreement on feasible and prudent alternatives to avoid or mitigate the adverse effects of the undertaking and on proposed language for an MOA, the Agency Official should prepare the final MOA, unless the consulting parties determine otherwise. The Agency Official may submit to the Executive Director for review the MOA with the signature of the SHPO and, when appropriate, any other signatory or concurring parties. If the Executive Director determines that it accurately reflects the agreement of the consulting parties, he shall sign it and forward it within 10 days to the Chairman for ratification in accordance with Section 800.6(c)(2). If the Executive Director determines the MOA is deficient, he may return it to the Agency Official for revision or may prepare an alternate MOA.

Alternately, to assist in focussing the consultation, a proposal for an MOA may be developed jointly by the Agency Official and the SHPO prior to

formal initiation of the consultation process and submitted for consideration along with the preliminary case report. A draft should not be signed when it is submitted at the beginning of the consultation process. Formalities of preparing the final MOA shall be determined by the consulting parties as the consultation process is concluded.

B. Expedited Process

In the case of noncontroversial undertakings that have effects which are customarily mitigated in a standard manner, following accepted professional practices such as those set out in the Council's Manual of Mitigation Measures, initial discussion between the Agency Official and the SHPO may indicate that a certain course of action is desirable and that further consultation with the Council is likely to reach the same result. In such a case, the Agency Official may prepare an MOA, obtain the signatures of the SHPO and any other appropriate signatories or concurring parties and submit the MOA to the Executive Director concurrent with the request for comments and preliminary case report (Sec. 800.4(d)). The Executive Director will review the MOA and accompanying documentation and, unless one of the following criteria is found to apply or the accompanying documentation is deficient, will sign the agreement within 30 days and forward it to the Chairman for ratification pursuant to Sec. 800.6(c)(2). Normally, an on-site inspection and public information meeting will be waived. The criteria for determining that further consultation is necessary are as follows:

1. Inadequate consideration of alternatives to lessen harm to historic properties.

2. Inadequacy of proposed mitigation measures.

3. Inadequacy of provisions to ensure that the mitigation measures are properly carried out.

4. Excessive costs of mitigation measures.

5. Inadequacy of public involvement or evidence of public controversy regarding impacts on historic properties.

6. Opposition of local government to the impacts of the undertaking or mitigation measures with regard to historic properties.

The Agency Official must ensure that the preliminary case report contains adequate information regarding these six areas. If the Executive Director determines further consultation is necessary, the consulting parties will then complete the consultation and prepare the MOA following the normal process.

IV. Formal Requirements of the MOA

Two principles guide the form of an MOA. First, an MOA is a legal document evidencing agency compliance with Section 106 and must unambiguously state all the terms for taking into account the undertaking's effects on historic properties. Second, an MOA should be concise and free of extraneous language, while accurately reflecting the parties' intent. An MOA may be adapted to the needs of a particular situation as long as these two principles are met. Certain standard language is useful to ensure clarity; drafters are encouraged to employ accepted terms and phrases or incorporate reference standards and guidelines issued by the Council to achieve their objectives. Drafters should not be constrained by stock terms when different language is more appropriate in a particular case. Objections to language simply because it deviates from a standard form will not be made unless there is a reason to believe the substituted language is ambiguous, misstates the intent of the parties, is legally insufficient or raises problems of substance.

An MOA must contain all the substantive elements of the agreement among the parties. These stipulations may be prepared as a separate document, delineating the rights and responsibilities of all signatories; this should be appended to an MOA that conforms to the attached sample. The stipulations may take the form of a letter or memorandum. Alternatively, the MOA may be drafted as a single document, incorporating the stipulations into the body of the MOA.

An MOA is normally executed with all signatures on a single original. Where all parties concur, an MOA may be executed in duplicate originals so that the assembled documents evidence the signatures of all parties, though not on a single document. An MOA executed this way will be submitted to the Chairman for ratification when all signed originals have been received by the Executive Director.

V. Parties to an MOA

The Council's regulations require that an MOA be signed by the Agency Official, the Executive Director, and the SHPO, unless the latter has declined to participate pursuant to Sec. 800.5(c). As a general rule, any other party who assumes a responsibility for action under the terms of an MOA should also be a signatory. Other parties who have an interest in the undertaking and its effects on historic properties may be invited by the consulting parties to indicate their concurrence with the MOA. This can be indicated by a concurring signature on the MOA or a letter of concurrence.

VI. Additional Information

Agency Officials, SHPOs and others who have specific questions regarding the preparation of an MOA are encouraged to contact the Executive Director for assistance in meeting the objectives of this guidance.

Appendix A: Sample Memorandum of Agreement

WHEREAS, the [agency] has determined that [undertaking] will have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places and has requested the comments of the Advisory Council on Historic Preservation pursuant to Section 106 [and Section 110f] of the National Historic Preservation Act (16 U.S.C. 470) and its implementing regulations, "Protection of Historic and Cultural Properties (36 CFR Part 800),"

NOW, THEREFORE, the [agency], the [State] Historic Preservation Officer, and the Advisory Council on Historic Preservation agree that the undertaking shall be implemented in accordance with the [following or attached] stipulations in order to take into account the effect of the undertaking on historic properties.

[Insert stipulations or attach to document]
Execution of this Memorandum of Agreement evidences that the [agency] has afforded the Council a reasonable opportunity to comment on the [undertaking] and its effects on historic properties and that the [agency] has taken into account the effects of its undertaking on historic properties.

Agency Official Date

State Historic Preservation Officer Date

Executive Director, ACHP Date

Chairman, ACHP Date

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